APPEAL NO. 93480

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was c onvened on May 11, 1993, in (city), Texas, and recessed until May 17th, on which date the record was closed. With regard to the single issue, whether the claimant's back was injured in the course and scope of her employment, hearing officer (hearing officer) determined that the claimant did not establish by a preponderance of the evidence that she sustained an injury, as defined by the 1989 Act, in the course and scope of her employment. Claimant, who is the appellant in this case, appeals this decision. The carrier basically responds that the decision of the hearing officer should be upheld.

DECISION

We affirm the decision and order of the hearing officer.

The facts of this case are set out extensively in the hearing officer's statement of evidence, and will not be repeated at great length herein. The claimant, who was a production worker for (employer), testified that on Friday, (date of injury), she was working at her station which was next to the walk-in freezer in employer's kitchen. She said (Mr. T) and (Mr. R) were unloading boxes of frozen fish from a conveyor belt into the freezer when Mr. R turned with a box in his hands and the box struck claimant in the back. She said that the blow caused her pain and that she screamed. Mr. R told her he was sorry, and (Ms. H), another coworker standing nearby, asked whether she was all right. The claimant continued to work and finished her shift that day. The claimant was not certain as to whether she worked the following days, Saturday and Sunday, but said that Monday was her day off and that she went to a hospital emergency room on Tuesday where she was treated for a contusion on her back. She said the bruise was about four inches wide and that it was in the area directly over her spine. The emergency room report says claimant was hit in the back with a box, diagnoses contusion to back, and recommends that the claimant see an orthopedist if there was no improvement. Claimant was also given modified work restrictions of no prolonged standing or walking and no lifting more than 15 pounds. Claimant subsequently saw Dr. G, who diagnosed lumbosacral strain and prescribed medication.

Mr. R, who is a cook for employer, remembered unloading boxes of food and supplies on the date in question, and said that he and Mr. T moved boxes of frozen food to the freezer on a dolly. However, he did not remember striking claimant with a box or apologizing to her, although he said it would be possible for a box to hit someone under the circumstances in which they worked. He said that a few days later he was asked by the claimant, in the presence of one of the managers, (Mr. F), whether he had hit her with a box. Mr. R said that this was the first time he was aware that the claimant was alleging to have been injured. The claimant said Mr. F also denied knowing anything about the incident.

Ms. H, who at the time of the hearing no longer worked for employer, testified that she was working alongside claimant on October 2nd but that she did not remember the injury occurring or hearing claimant scream.

The claimant also said she reported the incident to (Mr. B), the associate manager, right away. At the hearing, however, Mr. B testified that he was in the area when the boxes were being unloaded on October 2nd, and that he did not remember a box hitting claimant or claimant screaming. He said he did not believe it would be possible to hit someone with a box, because he always stands between the production workers and the unloaders.

The claimant maintained at the hearing that the other witnesses were aware of her injury and had not been truthful, and that they had motives for not telling the truth. She testified, for example, that she had been sexually harassed by Mr. R on a frequent basis, and that she had filed a complaint against him with the Equal Employment Opportunity Commission, a charge she said employer had settled with her. Mr. R denied he had sexually harassed claimant. Mr. B said claimant had filed similar charges against him, but that he did not know the outcome of the case.

We interpret claimant's appeal to state that the evidence does not support the hearing officer's decision, given the alleged untruthfulness of the other witnesses. Clearly, this case was one that hinged upon the credibility of each of the witnesses, and judging credibility is a responsibility which falls on the shoulders of the hearing officer. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34. To this end, the hearing officer as fact finder must resolve conflicts in the testimony and the evidence. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). He or she also may believe all, part, or none of any testimony. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. Civ. App.-Amarillo 1988, writ denied).

When a factual insufficiency challenge is brought, the reviewing panel must examine all the evidence in the record; and after considering and weighing all the evidence it may set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Having reviewed the record in this case, we decline to overturn the hearing officer on these grounds.

The decision of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge